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No. 88-333

In The

Supreme Court of the United States

October Term, 1988

STATE OF ALABAMA,

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Whether the presumption of vindictiveness established in *North Carolina v. Pearce*, 395 U.S. 711 (1969), applies when a defendant's guilty plea is withdrawn and, after a jury trial, he receives a greater sentence than he would have under the withdrawn guilty plea?

II. Whether the Alabama Supreme Court erred in holding that the enhancement of a defendant's sentence following a retrial upon withdrawal of a guilty plea can only be based on conduct occuring after the original sentence and not upon facts concerning the crime that were elucidated at the retrial?

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OPINIONS BELOW

1. The opinion of the Supreme Court of Alabama reversing respondent's conviction is not yet reported but is reproduced in the joint appendix at p. 107.

2. The Alabama Supreme Court's opinion and dissent denying Petitioner's application for rehearing is not yet reported but is reproduced in the joint appendix at p. 115.

3. The opinion of the Alabama Court of Criminal Appeals reversing Respondent's guilty plea and sentence is reported as *Smith v. State*, 494 So.2d 182 (Ala. Cr. App. 1986) and is reproduced in the joint appendix at p. 64.

JURISDICTION

The judgment of the Alabama Supreme Court which is sought to be reviewed was rendered on April 8, 1988 and rehearing was denied on June 24, 1988. The petition for certiorari was mailed on August 23, 1988 and this Court granted said petition on January 9, 1989.

This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment XIV (in pertinent part) " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The Respondent, James Lewis Smith, was charged with rape, sodomy, and burglary all in the first degree. On January 6, 1986, the Respondent entered into a plea agreement in which he agreed to plead guilty to burglary and rape both in the first degree in exchange for the State's dismissing the first degree sodomy charge. (J.A. 3-24) The State made no recommendation concerning Smith's sentence. The trial court dismissed the sodomy charge upon the State's motion and accepted the Respondent's guilty plea and sentenced him to thirty (30) years on each charge to be served concurrently (J.A. 23-24)

Subsequently, Smith moved to withdraw his guilty plea. (J.A. 47) The motion was denied by the trial court (J.A. 58) and Smith appealed to the Alabama Court of Criminal Appeals, which held that the trial court erred in accepting Smith's plea since he was not apprised of the fact that he was to be sentenced under the Alabama recidivist statute. (J.A. 64)

On remand, the case was assigned to the trial judge who accepted Smith's plea. The first degree sodomy charge was reinstated. (R. 426) On August 18, 1986, the Respondent was tried by a jury and convicted on all three charges.

On August 22, 1986, the Respondent appeared before the Court for sentencing.

The prosecutor moved to invoke the Alabama recidivist statute (because of its mandatory nature) (§ 13A-5-9, *Code of Alabama* 1975) and proved to the court's satisfaction that Smith had one prior felony conviction. (J.A.

80-81) The court also applied state law which required a minimum of a twenty year sentence. (§ 13A-5-6(A)(4), *Code of Alabama* 1975) (J.A. 81) Following this discussion, the court made the following comments:

> THE COURT: You had a trial and were convicted of rape, burglary and sodomy in the first degree. When you entered your plea, you told me your side of the story. And of course, now that the court has had a trial and heard all of the evidence – and the court by no means would increase your punishment beyond thirty years for rape and burglary on the fact that you were successful on your appeal because this court doesn't get into punishing or attempting to punish people for exercising all of their constitutional rights which is to appeal from a conviction or plea, or to have a trial if you so desire. There is nothing this court does which should be viewed as punishment for a successful appeal. I hope we all understand that. But under North Carolina versus Pearce, 395, U.S. 711; 23, L. Ed., 656; 89 S. Ct., 2072, the court finds that since I did not hear all of the testimony during your plea and now at trial have heard all of the testimony which consisted of raping the victim at least five times, and after the second or third time, then causing her to perform oral sex on you, and then of course, you performing oral sex on her, and then of course, at least raping her one or two more times after that, threatening her life with the knife and all, after looking at this matter, and your mental outlook on it and your position during the trial and what you said, the court finds that it's proper to increase the sentence beyond that which was given to you on the plea bargain.[1]

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[1] The court sentenced Respondent to concurrent life sentences for the burglary and sodomy charges and to one hundred and fifty (150) years on the rape charge.

On August 29, 1986, at a hearing on Smith's motion for new trial, Smith's attorney asserted that Smith's sentence was excessive. (R. 409) Specifically, counsel argued:

> And finally, we feel like the sentence was excessive. Based on the case law the trial court quoted to us at sentencing, we interpret that case law to say that it's not based on testimony heard within the case that can reflect an increase of sentence, but based on facts which are heard or about events that take place prior to trial after the initial crime has been committed that warrants an increase in the sentence, not the substantive issues of the case.
>
> THE COURT: Well, between the first trial and the second trial, the events became apparent.
>
> MR. CASON: Yes.
>
> THE COURT: That's when he wrote the court and admitted that he raped the woman.
>
> MR. CASON: Right. Which we feel goes to the substantive issues involved in the case. We contend that that case law goes to – the increase of sentence goes to material things that occur after the initial crime has been committed.
>
> THE COURT: Well, one of the material things was that –
>
> MR. CASON: That would aggregate the circumstances, obviously, to listen to the victim when the court took the plea given the facts to accept the plea bargain that was reversed.
>
> THE COURT: The court had no knowledge that he raped the woman five times, and he didn't contradict that. He sodomized her twice by him performing oral sex on her and then he on her, with the children across the hall, with the knife basically at her throat at all times except when he so-called put it in her hand and pointed it towards him and said do to me

> what you want to do at 1:00 or 2:00 a.m. with a ski mask on, who has gotten through the window as shown with the screen being missing, and that was not – the court was not aware of that at the plea. I feel like perhaps the sentence may not have been harsh enough.
>
> MR. CASON: Yes, sir.
>
> THE COURT: All right.

(R. 409-411)

SUMMARY OF THE ARGUMENT

I.

Pearce's presumption of vindictiveness should not apply when the original sentence was imposed after a plea agreement was negotiated and thus the trial court was without full knowledge of the defendant's actions and of the facts of the crime itself. Since there is a conflict among the circuits, this Court should follow the Fifth Circuit's rationale in *Frank v. Blackburn*, 646 F.2d 873 (5th Cir. 1980) and the Eleventh Circuit's rationale in *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir. 1985).

II.

If this Court engages the presumption of vindictiveness, it should find that the presumption was amply rebutted by the explanation of the trial court. The trial court explained that upon imposing the initial sentence, it was unaware of the seriousness of the offense but that it learned the true flavor of the offense from the testimony

at trial. For this reason, the trial court enhanced Respondent's burglary sentence from thirty years to life imprisonment under its interpretation of *North Carolina v. Pearce*. The Alabama Supreme Court, following the literal language of *Pearce*, found, however, that a sentence can only be enhanced for facts occurring after the original sentence. This position is erroneous under this Court's opinions of *United States v. Wasman* and *Texas v. McCullough* which refused to embrace this limitation and which permit a trial court to consider facts elucidated at trial in enhancing a defendant's sentence.

ARGUMENT

I.

PEARCE'S PRESUMPTION OF VINDICTIVENESS SHOULD NOT APPLY TO ENHANCED SENTENCES FOLLOWING A REPUDIATED PLEA AGREEMENT.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court held that the Due Process Clause of the Fourteenth Amendment ordinarily prevents a sentencing judge from enhancing a defendant's sentence after he has successfully obtained appellate review of his conviction and sentence. The evil sought to be prevented is judicial vindictiveness or the apprehension of such vindictiveness. However, this Court stopped short of ruling that the Due Process Clause always prevents a judge from enhancing a previous sentence. *Id.* at 726. Due Process is offended only by situations which pose a realistic likelihood of vindictiveness. *Blackledge v. Perry*, 417 U.S. 21 (1974); *Thigpen v. Roberts*, 468 U.S. 27 (1984). This Court's

case law has established a presumption of vindictiveness when a sentence is enhanced after a successful appeal. *Texas v. McCullough*, 475 U.S. 134 (1986). However, this Court's jurisprudence has also established that in situations where there is no realistic likelihood of vindictiveness the *Pearce* presumption does not apply. *Colten v. Kentucky*, 407 U.S. 104 (1972). ("The possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system.", *Id.* at 116); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) (stiffer sentence imposed by a different jury, after a successful appeal, does not offend due process).

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the defendant refused the prosecutor's offer of a five year sentence in exchange for a guilty plea. The prosecutor threatened to seek an indictment invoking Kentucky's habitual offender statute if the defendant did not accept the plea bargain. When the defendant refused to plead, the prosecutor carried out his threat and obtained the new indictment. This Court refused to extend the *Pearce* analysis into the plea bargaining process. Thus, in *Bordenkircher* the due process clause was not violated when the prosecutor carried out his threat to increase the charge if the defendant insisted on a trial. See also: *United States v. Goodwin*, 457 U.S. 368 (1982); *Ricketts v. Adamson*, ___ U.S. ___, 107 S.Ct. 2680 (1987). While *Bordenkircher* and *Goodwin* were concerned with the possibility of prosecutorial vindictiveness and this case involves an allegation of judicial vindictiveness, they are instructive because they involve decisions based on the outcome of plea negotiations. Simply stated, Petitioners are asking

this Court to hold that *Pearce's* presumption of vindictiveness should not apply when a judge enhances a defendant's sentence when the original sentence was entered after the defendant negotiated a plea and entered a guilty plea and the enhanced sentence was entered after a full trial.

The Fifth and Eleventh Circuits have dealt with the present fact situation in two en banc cases: (1) *Frank v. Blackburn*, 646 F.2d 873 (5th Cir. 1980) and (2) *Hitchcock v. Wainwright*, 770 F.2d 1514, 1518-1519 (11th Cir. 1985).

The facts in *Frank* are as follows:

> Once before the trial and once during a recess in the prosecution's case, the trial judge conducted a plea bargaining session in his chambers. Both the prosecutor and defense counsel participated in these sessions. On both occasions the judge, in response to a request from defense counsel, personally stated that he would sentence Frank to a period of twenty years confinement in return for a plea of guilty. Frank rejected both offers, stood trial, and was convicted by the jury, whereupon the judge imposed a sentence of thirty-three years in prison.

Frank, 646 F.2d at 875. On appeal Frank, attacked the sentence on the ". . . ground that the trial judge impermissibly increased the term of confinement because Frank rejected a plea bargain offer and elected to stand trial." *Id.* After a thorough discussion of plea bargaining in general, the court wrote:

> We agree wholeheartedly with Frank's assertion that a defendant cannot be punished *simply* for exercising his constitutional right to stand trial. We do not agree, however, that the mere imposition of a longer sentence than defendant would have received had he pleaded guilty automatically constitutes such punishment. The Supreme Court's plea bargaining decisions make it clear that a state is free to encourage guilty pleas by offering substantial benefits to a defendant, or by threatening an accused with more severe punishment should a negotiated plea be refused. It is equally clear that a defendant is free to accept or reject the "bargain" offered by the state. *Once the bargain – whether it be reduced charges, a recommended sentence, or some other concession – is rejected, however, the defendant cannot complain that the denial of the rejected offer constitutes a punishment or is evidence of judicial vindictiveness. To accept such an argument is to ignore completely the underlying philosophy and purposes of the plea bargaining system. If a defendant can successfully demand the same leniency after standing trial that was offered to him prior to trial in exchange for a guilty plea, all the incentives to plea bargain disappear; the defendant has nothing to lose by going to trial.*

Id. at 883 (citations omitted) (emphasis added). See also: *Ehl v. Estelle*, 654 F.2d 166 (5th Cir. 1981).

In *Hitchcock v. Wainwright*, 770 F.2d at 1514, 1518-1520 (11th Cir. 1985), *aff'd, on different grounds*, ___ U.S. ___, 107 S.Ct. 1821 (1987), the defendant asserted that he had been punished (in violation of the Due Process Clause) for exercising his right to a jury trial instead of accepting a plea agreement. The trial court and prosecutor allegedly offered the defendant a life sentence in exchange for a guilty plea. The defendant declined the offer. After trial, the court sentenced the defendant to death upon a jury's recommendation. The Eleventh Circuit assumed that the

defendant would have received the life sentence had he accepted the plea agreement.[2]

In discussing the applicability of *Pearce*, that court stated:

> Although the principle petitioner argues would apply on a retrial and a resentencing after a successful appeal, *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S.Ct. 2072, 2081, 23 L.Ed.2d 656 (1969); *Blackledge v. Perry*, 417 U.S. 21, 28-29, 94 S.Ct. 2098, 2102-2103, 40 L.Ed.2d 628 (1974), it does not apply to the failure of a plea bargain. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). In the "give-and-take" of plea bargaining, the state may extend leniency to a defendant who pleads guilty foregoing his right to jury trial. *Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). Legislative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to coerce inaccurate guilty pleas. *Compare United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (statute invalid when defendant could only receive death sentence if he went to trial) *with Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (statute valid when plea of *non vult* gave possibility of sentence of not more than 30 years but conviction at trial carried mandatory life sentence). A judge, as with the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an admission of guilt. *Cf. Corbitt*, 439 U.S. at 224 n. 14, 99 S.Ct. at 500 n. 14 (cannot permit prosecutor to offer leniency but not legislature).

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[2] The reported facts indicate that record was not clear on whether the court actually agreed to the agreement or merely stated he would consider it.

Sentencing after conviction following a failed plea bargain presents a different situation from sentencing after a prior sentence and retrial. Upon a second conviction, a defendant stands in the same posture for sentencing that he did after his first conviction. Presumably all facts have been before the court for determination of the correct sentence. Unless the court cites circumstances which occurred after his original sentence, a greater sentence would appear to be for no reason other than a penalty for the defendant's challenging of his conviction. See Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). *A defendant who pleads guilty, however, is in a markedly different posture than a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation. Moreover, by pleading guilty a defendant confers a "substantial benefit to the state:"*

> the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Brady v. United States, 397 U.S. at 752, 90 S.Ct. at 1471. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471. The heart of a plea bargain from a defendant's point of view is the option of

avoiding a possibly harsher sentence upon conviction at trial.

Id. at 1518-1519[3] (emphasis added).

In the *Pearce* situation, where the sentencing court theoretically had all the necessary facts in front of it at the original sentencing, hearing there is but one logical explanation for the increased sentence (absent an explanation by the judge) and that – as this Court has held – is judicial vindictiveness. Such is not the case in the post plea agreement situation. In this situation, the judge could be increasing the sentence because the defendant has not conferred any benefit on the state and therefore he need not be lenient. This would be the judicial equivalent of the facts in *Bordenkircher*. The judge could be increasing the sentence because he is now fully aware of the nature of the crime, the impact on the victim, and the degree and nature of the defendant's involvement in the crime. The mere fact that the defendant received a stiffer sentence is not an accurate measure of judicial vindictiveness, just as it is not an accurate measure of prosecutorial vindictiveness. *Goodwin*, 457 U.S. at 381. The facts of this case illustrate the point.

At the guilty plea hearing, the Respondent gave only the barest of details of the crimes stating simply that he cut the screen and went into the victim's house and had sex with the victim. (J.A. 15-16) He did admit he had a butcher knife (J.A. 16) and described the scanty apparel he was wearing at the time of the crime. (J.A. 17-18)

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[3] The Second Circuit has rejected the above analysis in *Robinson v. Scully*, 690 F.2d 21 (2nd Cir. 1982).

At the sentencing hearing (on the plea bargain) the victim testified that she and her children were afraid of living in their home. (J.A. 19-20) The court did acknowledge the "pain and mental problems" Respondent caused the victim. (J.A. 21-22) Prior to sentencing at the guilty plea, the court also had a pre-sentence investigation which gives only the meagerest "details" of the offense. (J.A. 26-47) The impact of the crime on the victim is more detailed but the ordeal she suffered is not presented.

After the victim's testimony at trial the court for the first time became aware of the full nature of the crime and its impact on the victim. For the first time, he became aware of the fact that the attack lasted approximately one hour; that the Respondent committed at least four acts of rape and two of sodomy; that the Respondent held a knife to the victim's chest during a portion of the attack; that the victim's three young children were across the hall when the attack took place.

The above additional facts fully justify the increased sentence and also demonstrated why this Court should not extend *Pearce* into this fact situation. After a trial, the sentencing court will most always know facts he was unaware of if a guilty plea had been entered. To presume that the trial judges of this country are acting vindictively in light of the new facts, is a disservice to them.[4]

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[4] The Petitioners are not suggesting that a defendant be foreclosed from proving vindictiveness in the post-plea-bargain situation. Petitioners are merely arguing that there should be no presumption of vindictiveness and the defendant should bear the burden of proof. See, e.g., *Goodwin*, 457 U.S. at 381, n. 12 (1982).

Since the sentencing court is not in the same position as he was when he sentenced the defendant after a plea agreement, the *Pearce* analysis and its remedy should not apply.

The analysis contained in *Hitchcock* and *Frank*, and illustrated by the facts of this case, are sound since they more accurately reflect the true situation a judge is in when he re-sentences a defendant after a failed plea bargain and full trial. As noted in *Frank* and *Hitchcock*, to apply the presumption to a post-plea-bargain situation would totally destroy the plea bargaining system. Since there is no realistic likelihood of vindictiveness the Court should not impose the *Pearce* presumption.

II.

THE ALABAMA SUPREME COURT ERRED IN HOLDING THAT THE ENHANCEMENT OF A DEFENDANT'S SENTENCE FOLLOWING A RETRIAL UPON WITHDRAWAL OF A GUILTY PLEA CAN ONLY BE BASED ON CONDUCT OCCURRING AFTER THE ORIGINAL SENTENCE AND NOT UPON FACTS CONCERNING THE CRIME THAT WERE ELUCIDATED AT THE RETRIAL.

The Respondent, James Lewis Smith, had entered a guilty plea for rape in the first degree and burglary in the first degree and was sentenced to two thirty year concurrent sentences. He successfully challenged his plea on appeal and was tried before the same judge who had accepted the plea on the charges of rape in the first degree, burglary in the first degree, and sodomy in the first degree which had been nol prossed pursuant to a plea agreement but was reinstated after the withdrawal of the plea. The Respondent was convicted on all charges.

At the sentencing hearing, the trial judge stated that upon sentencing the Respondent following his guilty plea, he was unaware of the details and the flavor of the offense which had been elucidated at trial. The court went further and noted that it was not acting vindictively in enhancing the Respondent's sentence because of his successful appeal of his guilty plea, but was enhancing the sentence because of the details of the offense learned at trial pursuant to its interpretation of *North Carolina v. Pearce*. Whereupon, the trial court sentenced the Respondent to two concurrent life sentences for the burglary and sodomy charges and a 150 year consecutive sentence for the rape. (R. 401-402). The case was eventually appealed to the Alabama Supreme Court which reviewed the propriety of the burglary sentence. In its April 8, 1988 opinion, the Court held that the trial court erred in enhancing the Respondent's burglary sentence. Under its interpretation of *Pearce*, the Alabama Supreme Court reasoned that a sentence can only be enhanced because of events occurring after a defendant's original sentence which cast light upon his character. However, in so holding, the Alabama Supreme Court ignored opinions of this Honorable Court which, rather than following the literal language of *Pearce*, examine the likelihood of vindictiveness and whether the presumption of vindictiveness was rebutted. (J.A. 96-99)

The rule is well settled that a judge or other sentencing authority is given broad discretion in determining an appropriate sentence. The sentencing authority must be allowed to consider all information which would bear on the proper sentence for the particular defendant given the crime committed. *Wasman v. United States*, 468 U.S.

559 (1984). This point was particularly made in *Williams v. New York*, 337 U.S. 241, 247 (1949) where this Court stated:

> "[h]ighly relevant – if not essential – to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."

Only by allowing such a breadth of information can an appropriate sentence be determined. *Wasman*, 468 U.S. at 564.

However, this Court in *North Carolina v. Pearce* placed a limitation upon this discretion. Two separate cases were before this Court in *Pearce*, and in both cases, the defendants had successfully challenged their convictions but were given greater sentences following retrial than they had originally received. This Court held that neither the Double Jeopardy Clause nor the Equal Protection Clause prevents the enhancement of sentence after reconviction so long as the enhancement was not motivated by vindictive retaliation by the judge. Particularly, this Court stated, "Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Pearce*, 395 U.S. at 725. Such retaliation would chill a defendant's constitutional right to appeal or to attack his conviction collaterally. To prevent such retaliation, this Court imposed a prophylactic rule that presumed vindictiveness but which could be overcome "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."

Pearce, 395 U.S. at 726. This Court then noted an example when the enhancement of a sentence is justified.

> "A trial judge is not constitutionally precluded . . . from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities . . . ' Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new pre-sentence investigation, from the defendant's prison record, or possibly from other sources."

Id. at 723.

It is from this language that the Alabama Supreme Court premised its opinion that a trial judge can only enhance a defendant's sentence for events subsequent to the first trial. The court failed to note, though, that in *Pearce*, unlike the case *sub judice*, the record was devoid of any explanation of the enhanced sentence to rebut the presumption of vindictiveness.

Since *Pearce*, this Court has examined on several occasions whether vindictive retaliation played a role where a defendant was given a greater sentence on retrial than he originally received.

Blackledge v. Perry, 417 U.S. 21 (1974), represents the only other instance where the presumption of vindictiveness was not overcome. In *Blackledge*, the defendant, a state prisoner, was charged with the misdemeanor offense of assault with a deadly weapon. He was convicted in district court and sentenced to six months consecutive to the sentence in which he was serving. He appealed to the County Superior Court for a trial de

novo. After notice of appeal was filed but prior to trial, the prosecutor obtained a felony assault indictment. The defendant pleaded guilty to the felony and was sentenced to five years. This Court held that due process does not summarily preclude enhancement of a sentence, but it does preclude those instances "that pose a realistic likelihood of vindictiveness." *Id.* at 27. The prosecutor in *Blackledge* had a personal stake in the outcome, and since the record was absent of any explanation by the prosecutor as to why the felony indictment was obtained, the presumption of vindictiveness set forward in *Pearce* was indulged and relief was granted.

The presumption, however, was not applied in *Colten v. Kentucky*, 407 U.S. 104 (1972); in context of Kentucky's trial de novo appeal system. This Court rejected the position that a de novo tribunal was prohibited from imposing a greater sentence than the sentence imposed following the original trial.

In *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), this Court found that the presumption of vindictiveness did not arise where a sentence was enhanced by a jury upon retrial. This Court found that the possibility of vindictiveness in this situation was minimal since a jury does not have a personal stake in the outcome like a judge or prosecutor. In so holding, this Court stated:

> "*Pearce* was not written with a view to protecting against the mere possibility that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process." *Chaffin*, 412 U.S. at 26.

Indeed, *Pearce* was only "premised on the apparent need to guard against vindictiveness in the sentencing process." *Chaffin*, 412 U.S. at 25.

Since the prophylactic rule in *Pearce* is merely to guard against vindictiveness, it should not be applied in the instant case. Unlike in *Pearce*, the trial judge in the instant case provides an explanation of the enhancement of the Respondent's sentence which clearly rebuts even the slightest inference of vindictiveness. Indeed, the judge specifically stated that he was not acting vindictively in enhancing the Respondent's sentence but was doing so because he had learned from the trial the cruelty of the offense. Since an adequate explanation appears on the record, the Alabama Supreme Court incorrectly applied the presumption of vindictiveness.

In *Bordenkircher*, 434 U.S. at 357, this Court refused to apply the presumption of vindictiveness to plea bargaining. This Court found that any retaliation was merely a by-product of plea negotiations. *Id.* at 362.

In *United States v. Goodwin*, 457 U.S. 368 (1982), this Court again found the presumption of vindictiveness was unwarranted where the prosecutor added a felony charge, prior to trial, to a defendant's misdemeanor charge after he had made a demand for a jury trial on the misdemeanor charge. *Goodwin* is pertinent to the instant case because it notes that the presumption of vindictiveness "may be overcome only by objective information on the record justifying the increased sentence." *Id.* at 374. *Goodwin* is also relevant because it expresses a reluctance by this Court to extend the presumption to instances where the likelihood of vindictiveness is not pronounced

since the presumption could often block "a legitimate response to criminal conduct." *Id.* at 773; *Wasman*, 468 U.S. at 566.

These holdings applying the rule set forth in *Pearce* clarify this Court's view "that due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights." *Wasman*, 468 U.S. at 568. In *Pearce* and *Blackledge*, the presumption of vindictiveness was applied and the defendant's rights to due process violated not because of the enhanced sentence but because there was no evidence on the record justifying the increase. In *Colten*, *Chaffin*, *Bordenkircher* and *Goodwin*, where the presumption was not applied, a violation of due process could still be established but only by proof of actual vindictiveness. *Wasman*, 468 U.S. at 569. Thus, where the presumption applies, the sentencing authority or the prosecutor must justify the increased sentence or charge, where the presumption does not lie, the defendant must prove actual vindictiveness. *Id.*

This Court in *Wasman*, 468 U.S. at 559, on facts closely analogous to the instant case, found that the presumption of vindictiveness was amply rebutted by the conduct of the trial court. In *Wasman*, the defendant was charged with mail fraud, but prior to trial he was indicted, tried, and convicted on the unrelated charge of knowingly and willingly making false statements in a passport application. At the sentencing hearing, the defendant's trial counsel urged the court not to consider the mail fraud charges in imposing the sentence. The trial court agreed and sentenced the defendant to two years,

all but six months of which were suspended in favor of three years probation. Thereafter, pursuant to a plea agreement, the Government dismissed the mail fraud indictment and the defendant entered a plea of *nolo contendre* and was sentenced by another judge to two years probation. *Id.* at 561.

Subsequently, the Court of Appeals reversed the defendant's first conviction, and he was retried and convicted before the same judge who initially heard the case. The judge sentenced the defendant to two years imprisonment, none of which was suspended. The judge explained that he was imposing the greater sentence because of the intervening conviction stating,

> "[W]hen I imposed sentence the first time, the only conviction on [petitioner's] record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I did not consider then and I don't in other cases either, pending matters because that would result in a pyramiding of sentences. At this time, he comes before me with two convictions. Last time, he came before me with one conviction."

Id. at 562.

The defendant asserted, as the Alabama Supreme Court in the instant case had, that the trial court was foreclosed from considering the intervening conviction by the plain language of *Pearce* since an increase of the sentence following a retrial "must be based upon objective information concerning identifiable conduct on part of the defendant occurring after the original sentencing proceeding." *Id.* at 570, citing *Pearce*, 395 U.S. at 726. This Court rejected this argument. Even though the presumption of vindictiveness was applied because of the

increased harshness of sentence, this Court held that the presumption was amply rebutted by the explanation of the trial court. *Wasman*, 468 U.S. at 469-470. Further, this Court concluded that *Pearce* does not preclude the consideration of an intervening conviction for an offense committed prior to the original sentencing. *Id.* at 571.

The impact of *Wasman* on the instant case is apparent. This Court refused to limit *Pearce*, as the Alabama Supreme Court would do, to permit only the consideration of conduct occurring after the original sentence in enhancing a defendant's sentence. Rather, where the presumption of vindictiveness is applied, it can be readily rebutted by an explanation of the increase by the trial court. In *Wasman*, the justification was the intervening conviction, and it was deemed sufficient by this Court. In the instant case, the justification is that the judge learned from the trial the flavor of the offense; this justification has also been deemed sufficient by this Court.

In *Texas v. McCullough*, 475 U.S. 134 (1986), this Court found that the presumption of vindictiveness was unwarranted on facts closely akin to those of the instant case. In *McCullough*, the defendant was convicted of murder and sentenced by the jury to twenty years. The trial judge granted his motion for new trial because of prosecutorial misconduct. The defendant was retried, and at this trial, the State presented testimony of two witnesses who did not testify at the first trial that the defendant rather than his accomplices committed the murder. The defendant was again convicted, but on this occasion, he opted to be sentenced by the judge. He was sentenced to fifty years imprisonment. The sentence was increased, the trial court explained, because of the new testimony presented at the

trial court explained, because of the new testimony presented at the retrial, because the court had learned at the retrial that the defendant had been released from prison for only four months prior to the crime, and because the court felt that the twenty year sentence initially imposed was too lenient. *Id.* at 978.

This Court found that the facts presented provided no basis for a presumption of vindictiveness. *Id.* at 979. The judge in *McCullough* was not reversed but granted the motion new trial herself; thus there was "no motivation to engage in self-vindication." *Id.* at 979, quoting *Chaffin*, 412 U.S. at 27. This Court went further and stated, "Presuming vindictiveness on this basis alone would be tantamount to presuming that a judge will be vindictive towards a defendant merely because he seeks acquittal." *Id.* at 979.

Further, this Court found that even if the *Pearce* presumption was applicable, it was sufficiently rebutted. This Court stated, "Nothing in *Pearce* is to be read as precluding a rebuttal of intimations of vindictiveness. . . . Restricting justifications for a sentence increase to only 'events that occurred subsequent to the original sentencing proceeding' could in some circumstances lead to absurd results." *Id.* at 980-981. Thus, this Court concluded that details of the offense learned at the retrial can be used to justify the enhancement of a defendant's sentence.

As in *McCullough*, the trial court in the instant case justified its enhancement of the Respondent's sentence because of details it learned of the offense at retrial. In its explanation, the trial court stated that it was unaware

following the Respondent's guilty plea proceeding that he actually had raped the victim five times, sodomized her on several occasions, and threatened the victim's life at knifepoint. Because of these facts, it enhanced the Respondent's sentence.

To extend the analysis of *Wasman* and *McCullough* to instances where a defendant is retried following the withdrawal of a guilty plea is logical and consistent with the preceding opinions of this Court. A guilty plea proceeding is sterile without full development of the facts. However, upon retrial, the flavor of the offense and its impact upon the victim is uncovered. Because of this development, the trial court can impose a sentence befitting the defendant and the crime. Thus, under this situation, an enhancement of a defendant's sentence can be readily justified. This analysis has been extended to this situation by the United States Courts of Appeals. *See, e.g., United States v. Carter*, 804 F.2d 508 (9th Cir. 1986); *Hitchcock*, 771 F.2d at 1514 (11th Cir. 1985); *Frank*, 646 F.2d at 873.

Upon applying the analysis of *Wasman* and *McCullough* to the instant case, this Court should uphold the increased sentence. The trial court's explanation clearly rebuts any presumption of vindictiveness. The Alabama Supreme Court was erroneous in adhering to the literal wording of *Pearce* rather than examining the likelihood of vindictiveness. Since the presumption is readily refuted, this Court should reverse the holding of the Alabama Supreme Court and uphold the imposition of the increased sentence.

CONCLUSION

This Court should reverse the Alabama Supreme Court's ruling and hold that the *Pearce* presumption does not apply to post-plea-bargain sentencing.

This Court should further hold that the trial court correctly considered facts developed at trial in justifying the increased sentence and the Alabama Supreme Court's ruling to the contrary is erroneous.

Respectfully submitted,

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